

1-1-1999

Human Rights and Non-State Actors

Thomas Michael McDonnell

Elisabeth Haub School of Law at Pace University, tmcdonnell@law.pace.edu

Follow this and additional works at: <http://digitalcommons.pace.edu/lawfaculty>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Thomas M. McDonnell et al., Human Rights and Non-State Actors, 11 Pace Int'l L. Rev. 205 (1999),
<http://digitalcommons.pace.edu/lawfaculty/277/>.

This Conference Proceeding is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

HUMAN RIGHTS AND NON-STATE ACTORS

Moderator

Thomas M. McDonnell
Pace Law School

Panelists

Patricia C. Armstrong
Lawyers Committee for Human Rights

Winston P. Nagan
University of Florida;
Former Chair, Amnesty International USA

Richard Dicker
Associate Counsel, Human Rights Watch

INTRODUCTION

Good morning. My name is Tom McDonnell. I am a Professor at Pace University School of Law. I am delighted to be here and I am privileged to be moderating this distinguished panel.

It is reputed that Tallyrand once said, "War is too important to be left to the generals," inspired by the Universal Declaration of Human Rights,¹ which Eleanor Roosevelt worked so diligently to bring about. Ordinary citizen groups in the last fifty years have demonstrated that foreign affairs, particularly as affecting the individual, are too important to be left to heads of state, to diplomats, or to big business. In 1948, when only forty-eight nongovernmental organizations had received consultative status with the U.N. Economic and Social Council², today 1,350 NGOs have such status. In addition, 1,550 NGOs have status with the U.N.'s Department of Labor, up from 200 in 1968.

¹ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

² *Id.*

As U.N. Under Secretary General Louise Frechette has said, "Today it is fair to say that NGOs are now entering into partnerships with states in the international law-making process."

Nowhere is this more vividly demonstrated than the events of the last two years. The international campaign to ban land mines,³ a coalition of hundreds of NGOs from over fifty-five countries, using primarily e-mail to organize themselves, spearheaded a grassroots movement that resulted in a Convention to Ban Land Mines, which 122 nations have signed and, now up-to-date, forty-seven have ratified.

Likewise, in July of this year in Rome, the ICC⁴ came about, but not simply because states were interested in it. Over 200 NGOs participated in the drafting and ultimate approval of that statute.

It is true that many challenges remain, but the door of citizen participation in the international law-making process has now been open, and perhaps will never be closed again due to the efforts of the human rights movement in the last fifty years.

Our panel will be discussing some of the critical challenges that nongovernmental organizations and other private actors face as we move into the next millennium.

Winston Nagan will be discussing the practical and theoretical aspects facing nongovernmental organizations, and will also be discussing and comparing his experience with Amnesty International and his experience in setting up a new NGO in Uganda. One thought: of the 1,550 NGOs associated with the U.N., only 251 come from developing countries. Winston will give us a little bit of a comparison of some of the concerns that were raised in the panel discussions last night — that is to say, our particular concern about dealing with the so-called "second generation" rights, the rights to economic and social development.

Winston is a native of South Africa. As a student, he was a member of the ANC⁵. He was exiled from that country in 1964. He later received degrees from Oxford, Duke, and Yale. He

³ See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 36 I.L.M. (1997).

⁴ International Criminal Court.

⁵ African National Congress.

was, as you may know, twice the Chair of Amnesty International USA, and he is also a Fellow to the World Academy of Arts and Sciences. A prolific writer on international legal issues, he is a Professor of Law at University of Florida School of Law.

Aside from dealing with NGOs per se, we will be discussing two other non-state actors, the first being the so-called international agencies, specifically the World Bank. I am delighted that on our panel is Patricia Armstrong. She is a Senior Coordinator of the International Financial Institutions Program at the Lawyers Committee for Human Rights. She is also a member of the Steering Committee of the North American Assembly, an organization which works cooperatively with other regional assemblies of the NGOs working on the World Bank. She will be discussing the interaction between her NGO and World Bank issues.

Lastly, Richard Dicker will be speaking. He is the Director of Human Rights Watch's program on Corporations and Human Rights. He has done field work in the Americas and Asia, and specifically works on the Phillip van Heusen campaign regarding allegations of that company's failure to abide by concerns regarding freedom of association.

I think we have an exciting group of panelists to listen to. I look forward to their comments.

Winston P. Nagan
Former Chair of Amnesty International USA
Trustee Research Fellow
Professor of Law
Affiliate Professor of Anthropology
Director: Project for Advanced Studies and
Research in Peace & Human Rights
University of Florida College of Law

*Human Rights, INGOs, and Global Civil Society**

INTRODUCTION

We are here today to celebrate a landmark event in the moral experience of our species. In 1948, the Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly.¹ Whatever the juridical limitations of the declaratory form of this major human rights instrument, it remains an explicit and authoritative codification of the most important value-commitments of the international community taken as a whole. Moreover, notwithstanding the increased capacity for absolutely lethal violations of the most basic rights of individuals in all parts of the planet, the UDHR has seen a steady and critical endorsement of its normative priority, as well as an intense and critical, contemporary struggle to ground its normative priority in instances of practical application. In short, the UDHR has been a critical symbol in the struggle to enshrine a clearer picture of the foundational concept of human dignity and has provided a powerful inspiration, as well as legitimizing presence, in the struggle to enhance in the widest possible way the experience of fundamental respect and human dignity.

* Prof. Nagan generously submitted a written transcript of the paper he presented at the Celebration. It is that paper, *Human Rights, INGOs, and Global Civil Society*, which is printed here. Notably, his remarks at the Celebration did not vary substantially from this paper.

¹ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR., 3d Sess., U.N. Doc.A/810 (1984) [hereinafter UDHR].

It is a very great pleasure to be in New York. Like the larger social process context of human rights, New York is the great melting pot of unmelted lumps. It is notorious that the way New Yorkers seem to identify themselves would suggest that people like me, who come from the other side of the Hudson, actually come from the "great unknown." In a sense, New York is, from a social process point-of-view, almost a paradigm of the larger, global human rights challenge. The larger world community comes with all the complexity of cultural, regional, religious, ideological, linguistic, ethnographic, gender diversity and/or stratification. The larger vista of the global community like New York is a vista — so to speak — which underlying pressures of globalism is a gigantic melting pot with a vast consistency of unmelted lumps. On the other hand, the senses of parochialism and inward-looking identifications often serve, perhaps, the unintended purpose of dis-identifying with the larger vista of humanity. In a sense, human rights activists from New York must have a keenly sensitive feel for the nature and structural preconditions that provoke human rights problems and challenge the capacity for human rights solutions.

I have been asked to discuss the issue of the role of INGOs in the making and application of human rights law and practice. I have, myself, been specifically involved with four major INGOs, working directly or indirectly with human rights matters. These include the American branch of the International Defense and Aid Fund for Southern Africa, the Policy Sciences Center, Amnesty International, and most recently, the Human Rights and Peace Centre of Makerere University. I hasten to add that I have had lesser roles on several other INGOs. For the purpose of this paper, I am going to focus on the role of INGOs in general. Then, I shall discuss more specifically some of the problems and issues that have touched upon a human rights organization that has often involved itself in direct action to secure human rights on a universal basis (Amnesty International) and an academic INGO concerned with a more specialized commitment to human rights activism that is appropriate to an INGO which has a specific academic mandate, as well as a broader sense of the intellectual responsibility higher education must embrace for the enhancement of human rights and peace (Makerere University, Human Rights and Peace Centre).

Perhaps the most general point that can be garnered from juxtaposing Amnesty International with Makerere's Human Rights and Peace Centre is that they are similar in the sense that they are concerned with human rights and that they are INGOs. However, they are quite different in the sense that they do vastly different things within the framework of the international human rights perspective. Indeed, this underlies the basic insight that there are today a vast number of INGOs, who — I would venture to say in fashionable terms — constitute what we may loosely call the “civil society.” In point of fact, not every INGO is an operation that seeks benign and ideal humanitarian and human rights goals. Some INGOs may well be in the business of doing everything possible to disparage world order and human dignity, as for example, in those non-governmental operations that are specialized to organized crime, terrorism, paramilitary, proto-fascist, hate and violence groups, and so on. Other INGOs may be the quintessential representatives of powerful political and economic interests, and whose basic orientation is not to the vindication of the common interest humanity has in human dignity, but rather to special interest concerns that may or may not coincide with some version of the human dignity objective. In other words, we have to be cautious about the power vacuum produced by an uncritical proliferation of the global institutions of civil society, recognizing that some of these institutions of civil society are critical to the struggle *for* human rights, while others are critical to the struggle *against* human rights.

INGOs, STRUGGLE, AND MULTIPLE PERSPECTIVES ON HUMAN RIGHTS

The most important insight that we can garner about the role of the INGO in the protection and enhancement of universal human rights is that INGOs are essentially involved in a struggle to vindicate the values of human rights and peace. In short, we may ask ourselves what currency contemporary human rights would have in a global system dominated by sovereign States and powerful interest groups animated by the imperatives of what Professor Michael Reisman calls the “global

war system.”² Let me provide three illustrations of this point. First, the International Court of Justice recently gave its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.³ Although the Court was responding to a request for an advisory opinion from the General Assembly, in fact, this litigation would not have happened but for the pressures which emanated from those sectors of civil society concerned about the threat nuclear weapons pose to the future of humanity. A second example might also serve to clarify this point. Amnesty International had long-made the issue of torture a major part of both its mandate and its operational techniques to secure the abolition of torture on a global basis. It is true that the international community eventually promulgated an important convention which sought to outlaw torture and related practices. However, there would be no Torture Convention⁴ if not for the focused activism of Amnesty International in its struggle to secure the legal abolition of torture on a universal basis. In the context of humanitarian law, it requires no massive documentation to appreciate the role of the International Committee of the Red Cross (ICRC) in its work to give legal and political efficacy to the basic rules governing the *ius in bello*. What we see in these three examples is that INGOs, however constituted, are involved in the struggle for human rights.

I want to explore this general question of the struggle for human rights somewhat more carefully. The struggle for human rights is part of the larger struggle within social process for determining how the most fundamental values of a community are to be reproduced and distributed. This means, for example, that norm-creation, including human rights norm-creation, is an ongoing part of the dynamic of the social process of human interaction, and in this sense, is a struggle for and about power, and a struggle for constitutionalism and the rule of law. I submit that the perspective of human rights through

² See W. Michael Reisman, *Private Armies in a Global War System: Prologue for Decision*, 14 VA. J. INT'L. L. 1 (1973).

³ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 227-67.

⁴ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment [hereinafter Torture Convention], 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985). This Convention was adopted without a vote by the United Nations General Assembly on December 10, 1984. It was entered into force on June 26, 1987.

the focal lens of struggle is a very critical aspect of not only the dynamic component of human rights, but also the larger dynamic of social norm generation. In short, INGOs are often the pressure behind the process which seeks to generate improved normative understandings about expectations of dignity, improved normative expectations that may be grounded in juridical form and operational practice, and which as well may serve as a further incentive for the application and enforcement aspect of the human rights normative structure.

It is not my intention to focus specifically on the technical processes of communication and collaboration within which INGOs have played a critical part in the globalization of human rights, in the cultural foundations of human rights, and in the juridical bases of human rights prescriptions. However, it may be worthwhile if we juxtapose the perspective of struggle about communication and collaboration for human rights objectives against the growth of specialized professions, organizations, and interest groups, all of whom hold deep concerns about the prospect of human dignity on a universal basis.

Since this meeting is composed largely of members of the legal profession, it may be noted that the legal profession, and especially international lawyers, have been a critical building block for the vindication of human rights, both in theory and in operational practice. Hence, there is a very substantial temptation to focus on the UDHR and allied instruments as representing legal doctrine, sustained by human rights jurisprudence and falling within the sphere of what, conventionally, lawyers normally do. Lawyers would bring their skills of analysis, construction, and interpretation in order to define both the universe of human rights law and the scope of its application.

The difficult relationship between INGOs (that are not specialists in the juridical sense) and the role of lawyers (who would have to self-consciously determine what is appropriate for juridical exposition, prescription, and application) would at best be a difficult exercise. For example, the temptation of lawyers may be to hold that certain kinds of alleged rights can never be reduced to legal rights. This might include the right to development, the right to peace, or the right to positive social entitlements. Since these rights are not amenable ostensibly to juridical resolution, they may not be viewed as human rights at

all, from a juridical point of view. This would be the struggle for perspective within which the law or legal profession would dominate.

Let us take a second perspective. How would a philosopher, in general, look at the UDHR? A philosopher may see the UDHR as a species of moral declaration. This would essentially mean that human rights fall within the framework of the analysis of moral propositions. A philosopher would immediately recognize that there is a vast amount of normative communication in the world of social and political experience. However, the philosopher would nonetheless hold that only a few normative expressions could qualify for the label "moral proposition," and fewer still would meet the test of universality. In short, there may be very few human rights that can meet the test of universal moral human rights.

Even more controversially, there may be the very foundational question of "what a right actually is." Philosophers have for example suggested that what is meant by the term "right" is the term "entitlement." When pressed to determine what an entitlement is, the answer in all likelihood is, "It is a right." These will also be influenced by the fact that the techniques of moral analysis are not the same as the techniques of legal analysis. While the legal analysts sometimes include philosophical analysis in the process of justifying human rights, moral theory basically does not look for a "slot machine" answer to the validation of the human rights norm. Philosophers basically look at a process of reason and justification, along the lines of the tradition of Aquinas and others.

There is a third perspective which we tend to associate with the social sciences, and often, with those who work in the pragmatic, philosophical tradition. In this perspective, human rights must be seen as a theory for inquiry. That is to say, while the codes and various official and quasi-official communications tell us a great deal about the content and procedure of human rights, an understanding of human rights in its relationship to universal dignity requires an ongoing inquiring system. This perspective is related to the fourth perspective about which more will be said. If however, we hold that a theory for inquiry is an important aspect of human rights understanding, it is because the struggle for human rights often involves, at

least at the frontiers of the subject, a competition for claims and for normative priority. Thus, for example, the classic conundrum of whether the freedom of the press should prevail over the rights of a defendant. This perspective would throw light on the social process context of human rights claiming, of human rights responses to claims, and of the lacunae within which claims generate limited, marginal or even no responses. In short, the inquiring lens might open up an important, neglected area about the problem of the human rights struggle in the form of claiming, counterclaiming, and the problem of social response to these phenomena. In other words, this perspective or focal lens may deepen our understanding of the context of social, moral, and legal experience.

There is a fourth perspective that I want to get at and put into the framework of our conversation, and that is the theory of human rights as struggle, the eternal struggle for justice — the one that involves the INGOs; the one that involves ordinary folks; the one that involves the ordinary membership in organizations like Amnesty International, who pay their \$25 a year and try to make some commitment to the improvement of the human prospect. The perspective of human rights as a process of struggle injects the issue of social dynamism and social change. The emphasis on human rights as a component of normatively guided change requires that we understand much more about the social and the power processes of global society and the role of critical actors who might be specialized to the organization and presentation of claims relating to human rights. In this respect, the role of the INGO is a vital and important element of the social, power, and constitutive context of human rights culture seen in global terms.

Another aspect that serves to provide more clarity to the issue of claim assertion and human rights is the very term “rights” itself. It is notorious that different perspectives about human rights may give different nuances to the very term “right.” The conception of rights may vary depending upon whether one brings a juridical, philosophical, sociological or anthropological, or historical lens to the elucidation of the concept of “right” in general, and “human rights” in particular. Thus, rights may derive their meaning from some formalistic criterion of validation, from some justification predicated on the univer-

sal moral norm, or from the understandings derived from social process and moral experience that come in the form of fundamental expectations about right and wrong. This is a fertile area of confusion in a context which is essentially interdisciplinary, and which aspires to a level of practicality rooted in the actual realities of social organization. To illustrate some level of confusion, as we have seen, philosophers have often said that a right is essentially an entitlement. When they are pressed as to what an entitlement is, they maintain that it is a right. Perhaps these confusions may be moderated if the conception of human rights as rights is contextualized to include its foundational animus as a struggle about legal, political, economic, social, cultural, sexual, racial, and ethnic agitation for an improved human prospect. The stress on the struggle context of human rights underlines the importance of understanding what exactly is happening in civil society from a global point of view, and to focus on the critical non-governmental actors who constitute the global civil society to determine the scope, character, and efficacy of their efforts to promote human rights and peace, or indeed to disparage it.

A BRIEF HISTORICAL REVIEW OF DIVERSE INGOs IN GLOBAL SOCIETY

One of the important insights that social realists have sought to bring to the analysis of international relations and international law is the insistence that the State, while a critical participant in international, constitutional order, is by no means the only critical player in that order. Global society today witnesses a vast proliferation of players in the international arena, in addition to States; these include intergovernmental organizations, multinational corporations, political parties, pressure groups, paramilitary organizations, liberation movements, and the vast constellation of national and international non-governmental organizations, some of which are critical players in the struggle for human rights and peace. Taken literally, the terms "non-governmental organization" include everything that is not governmental. Literally, this could mean organized crime, such as the Mafia on the one hand and the Carnegie Foundation on the other. It would be very useful to provide a historical gloss on the role of critical non-governmen-

tal players who have shaped the modern history of our global social process.

During the 17th, 18th, and 19th Centuries, global society, which then was even more highly decentralized than it is today, came under the influence of interest groups deeply inspired by economic incentives. These interest groups formed themselves into vast corporations and may, in some respects, be seen as the forerunners of the multinational corporations of today. The English East India Company, founded in 1600, was one of the most profoundly important political and economic organizations for the extension of British colonial culture. The company set up its own courts; it set up its own system of governance and administration. The company effectively administered India as a company possession until the latter part of the 19th Century when colonial administration set up the Raj.

The Dutch East India Company was founded in 1602. It colonized South Africa, which remained a company possession until the British occupied the Cape in the latter part of the 18th Century. The company, in large part, was responsible for the establishment of the Dutch Colonial Empire in what was called Batavia, and which now is called Indonesia. These companies (English East India Company and Dutch East India Company) were essentially commercially driven entities, but their role encompassed a great deal more than simply economic imperialism. Not only did these companies rule vast empires for several centuries, they also laid an essential predicate for the form of colonial public order of the 19th and early 20th Centuries.

One might also include a brief reference to the British South Africa Company. The company was controlled by Rhodes, and Rhodes organized the company in such a way that the company included within its operations a private army for colonial expansion. The British South Africa Company conquered Zimbabwe and claimed Zimbabwe as its own private property. *In re Southern Rhodesia*,⁵ decided in 1919, the Privy Council determined that the company could not have actually acquired the physical property of a whole country as its own private property; but in fact, neither did the blacks own it; it was owned by the King of England.

⁵ *In Re Southern Rhodesia*, AC 1919.

Not all interests emerging from the civil society were as materialistically oriented as the great charter companies. For example, the London Missionary Society was the institutional harbinger of the famous philanthropic movement in England, which was essentially progressive in its own time when it came to the rights of colonial peoples. The philanthropic movement was especially interested in the advancement of education, the abolition of slavery, and represented a major element of the framework of progressive thinking in international affairs.

INTERNATIONAL SOCIETY AND INGOs IN THE 20TH CENTURY

One of the most remarkable books on the study of international relations in the 20th Century was Professor Harold D. Lasswell's *World Politics and Personal Insecurity*.⁶ At the time Lasswell wrote the book — in the 1930s —, it was said that “it was an absolutely great book but nobody knew why.” The question he raised struck at the heart of the conventional approach to international relations and international law. If international relations focused on the problem of conflict and war, it was a conflict and war between sovereign States. In international law, the doctrine was — and to some extent still is — important. It was a law by sovereign States for sovereign States. The idea that world politics might include variables of a non-State character, or that personal insecurity might be a consequence and a condition of the global war system, was a startling idea even in its own time. Indeed, I suspect it is a startling idea even today. Among other things, Lasswell's theory pointed to a very important foundational precept of the international system, that there were participants other than the State from a realistic point of view that have to be accounted for, namely, that these participants outside of necessarily the State framework influence, but who nonetheless condition, impact, and are being impacted by world order issues.

The above insight is reflected in the contemporary era in the People's Earth Declaration. The Declaration, in part, reads as follows:

⁶ HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935); (reprinted, 1965).

We, the people of the world, will mobilize the forces of transnational civil society behind a widely shared agenda that bonds our many social movements in pursuit of just, sustainable, and participatory human societies. In doing so, we are forging our own instruments and processes for redefining the nature and meaning of human progress and for transforming those institutions that no longer respond to our needs.

The People's Earth Declaration is a challenging proposition. It ties in to some degree with the theme, that when we look at the INGOs, we look at agents of change; at the processes of agitation to improve the circumstance in all spheres, including the legal, the political, the economic; and more. Moreover, it seems to be clear that the next millennium will still operate under the benign — as well as lethal — influences of whatever world order arrangements we have inherited since World War II. Among the themes that came out of World War II experience is the notion of total war — that is, in a sense, a war on the entire social process itself. This is an important theme.

The idea of conducting war on the entire social process, as distinct from professional armies relatively exclusively in combat, is a very different and disturbing concept for human experience. In the context of this kind of war, the role of people's movements of resistance began to emerge, and therefore we cannot absolve ourselves from the challenges of people's movements — first in Eastern Europe, later in Africa and Asia and Latin America — emerging as instruments of radical, sometimes even revolutionary, change. However, their modern roots are tied to the processes of Nazi hegemony and Japanese proto-fascism.

The Nuremberg process directly and indirectly impacted upon the position of non-state actors in international law. The rise of the Nuremberg Precepts are important in this regard, and parenthetically, are something of an historical accident, contrary to the views of some people here that there seems to be some kind of an inevitability about Nuremberg: it was an accident that it happened. The first inklings of trials actually came out of Stalin. In 1942, when some concrete expression was made to give this suggestion some form, there was resistance to it. The British were the prime resisters. They did not want it. They demolished the American delegation negotiating the Nu-

remberg Precepts in London in 1944. The resilient Americans showed up in San Francisco in 1945 with a far more compelling defense of the Nuremberg proposals. The opponents of Nuremberg were caught unprepared in San Francisco, and so in retrospect, one might see the Nuremberg Process as something of an accident. Indeed, Stalin had talked about shooting 50,000 *Einsatzgruppen*. Churchill was much more humane and thought the Allies should shoot about 5,000 of the S.S.

From the standpoint of world order and international relations, Nuremberg does very important things in terms of theory and practice. For example, the Nuremberg process penetrates the veil of the State, and in doing so, radically modifies the traditional understanding of the concept of sovereignty. Although there are powerful forces today who often assert a near absolutist conception of sovereignty, this is a view that is increasingly seen as a very odd construction of the constitutional position of a State in international society. However the breach in the immutable, if not omnipotent, conception of sovereignty, in large measure, is due to the Nuremberg experience; and in this sense, that experience is a very revolutionary one. To extend this analysis further, Nuremberg makes individuals subject to international law. It also gives those individuals rights to adequate representation and fair judicial proceedings, which are rights guaranteed by the international character of the process. That is to say, Nuremberg changes the subject/object dimension of international legal order. The same is true with people's rights, with individual rights, and with the application of humanitarian precepts. The legacy of Nuremberg into the Charter — with its focus on human rights and on "We, the people" — does create at least some kind of a modest doctrinal predicate for non-State actors participating in the system.

We are currently experiencing a post-Cold War era under pressures of political and economic globalism. Immense pressures are being exerted on the State system. However, these pressures are different from the pressures experienced during the heyday of the Cold War. During the Cold War, the pressure on the State system focused on levels of subordination to Superpower security and ideological interests. This came at a point when emerging States were attempting to assert a form of sovereignty that might insulate them from the political hegemony

of the Cold War. The Cold War produced or reproduced a vigorous assertion of sovereignty on the part of small States, and a vigorous depreciation of sovereignty at the altar of ideological expediency of the imperial powers. The Cold War and the aspirations of global hegemony put pressure on the States in terms of levels of subordination to superpower interests. In addition to inter-State conflicts were the pressures to decolonize the world community, and therefore, additional pressures to recognize movements of national liberation and self-determination as critical players in the international system. These conflicts simply underlined the critical importance of both human rights and humanitarian issues in the emerging pattern of changing international social order.

The critical importance of the civil society construct as an ideological perspective should also be seen in the context of the ideological rifts of East and West during the Cold War. In the East, we had the idea of a total State and a command economy. In the West, we either had the idea of the democratic State, an open economy, and the critical space for civil society. The total State, to the extent that it permits interests to be articulated, expresses them through the State or through the party. The democratic State encourages expression of interest that is essentially more anarchic and, in some views, more free.

GLOBALISM, CIVIL SOCIETY, AND INGOs: THE NEW IDEOLOGY

The roles of the State and civil society, as well as the growth of INGOs record a great deal of tension and conflict in the context of the Cold War era. In this part of the essay, we throw some light on how these tensions have played themselves out in the post-Cold War period. One point is very clear: the idea of civil society, viewed from a global perspective, is to a very large extent viewed as an incipient form of global democratization. It is unclear, whether as an ideological construct, this is sufficiently sensitive to the reality of the distribution of power in the global civil society, but nonetheless, it is ideologically promoted as a very critical component of an improved world order.

The Union of International Associations urges that we are in the midst of a global revolution relating to the context, structure, and process of civil society. The organization holds, for example, that there are incipient trends toward global

democratization that are powerful and that there are incipient trends toward the visualization of an alternative organization design, although the organization does not tell us exactly what the alternative design is.

There exist large and complex organizations in the international system, which are deeply impacted upon by the communications revolution. Critical indices are being developed to determine the extent of cohesion and bonding, as well as the level of formalization and coherence, of INGOs. According to the Union of International Associations,

There are many large, complex organizations, whether intergovernmental organizations or multinational corporations - or their national equivalents. Many not-for-profit organizations are increasingly complex. Such complexity takes the form of numerous specialized units. The challenge is to ensure that they work together in a coherent, meaningful manner - however that comes to be understood. Increasingly, the communications of such organizations are electronically based. The question is how the communications between the parts are organized.

The "weak-bonding" approach may ensure some valued, but haphazard, communication between specialized units - although this is often subject to suspicious hierarchical controls or abuse. Some forms of groupware provide a form of strong-bonding (commitment checking, etc.). But again it may be useful to explore the notions of interlocking round tables as the basis for the emergence of new forms of non-hierarchical organization that may be vital to sustainable community. It might prove to be the case that the sustainability [sic] of a community results from appropriate global configuration - interlocking the diversity of community dialogue arenas.

When we place these insights in the context of the emergent "new" Globalism Epoch, the importance of understanding the role of INGOs in the context of the progressive move toward global democratization requires us to understand more adequately the conditions shaping the future of world order and world politics. How are we to understand the "forces" of globalism and the role of INGOs within it? James Rosenau argues that "the best way to grasp world affairs today is to view them as an endless series of tensions in which the forces pressing for greater globalization and those pressing for greater localization

interactively play themselves out.”⁷ These forces, Rosenau argues, are influenced by the skill and communication revolution, the “organizational explosion”⁸ which witnesses “staggering number of new organizations,”⁹ some tightly organized with clear lines of interest and authority, and others that are “loosely structured.”¹⁰ These processes suggest States are getting stronger in some respects and weaker in others; there is a reassertion of the archaic idea of “sovereignty,” while it is being eroded by the facts of economic, military, and cultural interdependence. In addition, there is the exponential growth of INGOs, including human rights INGOs.

In short, the structural foundations of international order are in flux as the locus of power becomes rearranged and increasingly fluid. At the theoretical level, we are witnessing a profound change in the structure and process of international constitutional order, in which there is considerable rearrangement of the vectors of control and authority in international society. To the credit of the UN ECSOC, it long ago recognized the importance of consultative status with INGOs, as indicated in its Resolution 1296 (XLIV) (1968). Among the criteria for such status (apart from acting within the Charter framework) was that such a group have an established headquarters, a democratic constitution, an international “structure,” and controls over its resource base. In conclusion, the role of the INGOs in the defense and enhancement of a global era of human rights must be seen in light of the emerging world context. The cliché holds that ours is an epoch of globalism. What exactly this means is in some measure controverted. As a loose generalization, ours is an epoch of extraordinary dynamic potentiality. The capacity to inflict human misery, even to provoke a crisis of survivability of humankind has enormously enhanced potentials. Similarly, the capacities to do good, to enhance the human prospect, and to make great strides toward a public order of universal dignity are also enhanced. The “struggle” continues.

⁷ James Rosenau, *The Future of Politics*, paper presented to the World Assembly of the World Academy of Art and Science, November 1998.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

INGOs, HUMAN RIGHTS, AND INFORMAL LAW-MAKING

Human beings, in their interaction and relations with others, are a norm-generating species. Therefore, it is surprising and somewhat astigmatic that a foundational idea of traditional jurisprudence is that all law-making is a State prerogative. A critical area of note is the role that INGOs actually play in the processes of norm generation and norm application in the human rights context. It has long been recognized that the associations, affiliations, and groups that constitute the global social process are indeed institutions with a dynamic "living law" component, *i.e.*, there is a factual or behavioral law or constitution that coexists with the "formal" law. The law-making role of INGOs is an understudied phenomenon, but a critical dimension of human rights law and the legal structure that sustains it. Would we, for example, have had a Torture Convention¹¹ without Amnesty International? Would we have had the Ad Hoc International Criminal Tribunal¹² without the work of the Watch Committees? Therefore, we must see in the "new" epoch that human rights law-making and application is a richer, more comprehensive, and more complex process than the older, State-centered paradigm.

The insight relating to the role of INGOs in informal law-making raises a further practical problem because of the vast disparity and differences in the structure and organization of INGOs, even if their objectives are directed at issues of international peace and human rights. Essentially, if they are moved by the ideology and spirit of democracy, and if they see themselves as part of the evolution of global civil society moving incrementally toward a global process of self-generating democratic values, then we need to more carefully appraise the efficacy of critical conditions that sustain notions of democracy at any level of social organization. In general, this will reflect upon questions that relate to the nature of the decision process

¹¹ Torture Convention, *supra* note 4.

¹² For example, the Ad Hoc Criminal Tribunal for the Former Yugoslavia and the Ad Hoc Criminal Tribunal for Rwanda. *See generally*, M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); JOHN R. W. D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (1997); VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (1998).

and the claiming process that inform the INGO. How inclusive, for example, is participation in the decision process of the INGO? How transparent, accountable, and responsible is that decision process? The critical institutions of democratic ideology must ultimately confront the nature of its essential decision process. Such a consideration will include a number of specific issues and questions that must be assayed. For the sake of brevity, these issues are listed as follows:

- 1) The issue of transparency.
- 2) The structure of decision making: is it hierarchical or democratic?
- 3) The level of bureaucracy: how permeable or impermeable is the bureaucracy?
- 4) The capture of INGOs and the possibility of personal agendas by the operative decision makers.
- 5) The issue of secretive decision making within the framework of an INGO.
- 6) The possibility of special interest "tunnel vision" conceptions with respect to functions and operations of INGOs.
- 7) The possibility that they may be even close-minded in their critical decision processes and structures insulated, if you like.
- 8) The complexities of how they are funded, and how responsible they are for the funding that they get.
- 9) Invidious problems that touch on competing for scarce funding resources. In other words, often human rights INGOs, humanitarian INGOs, really ought to be functioning with a view to their extinction. They are rather happy when terrible things happen because they are funding opportunities.

AMNESTY INTERNATIONAL AND MAKERERE UNIVERSITY'S HUMAN
RIGHTS AND PEACE CENTRE: COMPARISONS
AND CONTRASTS

Amnesty International is one of the most important INGOs in the human rights movement. It is a non-governmental organization in the classic sense of the term. It seeks to influence governments in terms of human rights performance, but it proclaims itself to be independent of any governmental influence. Amnesty International is generally viewed as a First World human rights organization, although it has a powerful presence in the Third World as well. It has historically been aggressive in promoting human rights development as an important part

of universalizing the influence of its mandate. Amnesty International is divided, roughly speaking, into two significant components. First, there is the professional staff operating in its Secretariat and in its national sections. Second, there are the volunteers, the movement, which is comprised of any person who wishes to pay modest dues in order to become a member of the organization. It is a membership intensive organization. The members make policy, and the supreme policy-making body within the organization is its elected international council. Because it is a membership intensive organization, Amnesty International incorporates many of the criteria associated with democratic decision-making, including appropriate levels of transparency, accountability, and responsibility.

Amnesty International is organized upon the basis of an independent mandate. That mandate incorporates many of the important human rights provisions in the UDHR, but it is, by choice, a narrow mandate; its members fight crucial battles within the organization to keep the mandate narrow. The reason for a narrow mandate is that the organization is particularly interested in being effective with respect to the protection of human rights that fall within its mandate. The broader the mandate, the greater the demands for strategies of action that are effective. A narrower mandate gives a great priority to the efficacy of practical, strategic intervention.

Amnesty International's mandate has been extraordinarily successful, but it is not without its critics. Perhaps the most important limitation on the Amnesty International mandate is giving a narrow gloss to human rights that effectively justifies a narrow conception of human rights, even when that is not necessarily the animating reason for a narrow mandate. A narrow mandate also imposes a cognitive methodology on those who employ it. That methodology may run the risk of removing human rights violations from the relevant social and political contexts. By de-contextualizing human rights violations, we may provide short-term gains in the protection of human rights; however, we may obscure the broader framework of conditions that reproduce those human rights violations, thereby inhibiting broader, strategic policies that are critical to ameliorating the root causes of gross human rights violations. These limitations are very apparent in context of armed conflict or in the

context of those forms of conflict that are loosely styled "ethnic conflict." These kinds of conflicts have not been effectively assayed in Amnesty International's work profile, although the organization has recognized, perhaps belatedly, the importance of sustainable and durable peace initiatives to the protection of fundamental human rights.

In the context of the Gulf War, Amnesty International emerged with a powerful report detailing the ubiquity of the grossest forms of human rights violations by the Iraqi dictator, Saddam Hussein. One of the stories in the report suggested that the regime had sanctioned the removal of premature babies from incubators in Kuwait. When the report was about to be released, the leadership in the organization expressed concerns about whether its report might not fuel the gods of war. As it turned out, the report was immediately distributed to the entire Congress of the United States by the Bush administration and was used by President Bush as one of the vehicles for the demonizing of the Iraqi dictator. This kind of problem is difficult for a narrowly-focused human rights organization that does not take a position on who is right or wrong in the context of an armed conflict. Yet, the report of the organization would have the effect of an alignment on one side of the conflict, even if this were not intended. Here, the narrow mandate and its non-contextual focus on human rights violations have the disadvantage of blinding the organization's decision-makers to the political consequences of releasing such a report. Perhaps if Amnesty International had been a broader human rights group concerned with peace as well, it might have been easier to strike a balance between its need to tell the truth, and its need to tell the truth in a timely and responsible manner.

The narrow mandate of Amnesty International also provided the organization with great difficulties in accepting the possibility that it could denounce apartheid. It maintained, somewhat disingenuously, that apartheid was purely ideological and that its policies relating to the freedom of conscience would not permit a resolute condemnation of it. Although it had been argued that apartheid was more than ideology, that in fact it was operational policy and practice — and that as operational policy and practice, it was completely inconsistent with the entire prescriptive force of the UDHR - the organization's

decision structure was never able to sufficiently contextualize the apartheid process to secure a clear condemnation of it as simply inconsistent with human rights and with the organization's own mandate.

These problems are illustrative of the proposition that, on the one hand, human rights activism involving mass-based participation requires simplification in order to generate the relevant level of legitimizing efficacy. On the other hand, the conception of human rights, somewhat immunized from context — and therefore immunized from understanding the complex interdependencies that shape the broader and more comprehensive relationship of human rights to peace and human rights to justice — is in some measure sacrificed. Stated shortly, an INGO such as Amnesty International represents important possibilities, but also important limitations in universalizing the culture of human rights for the millennium.

We may now move to the experience of creating a Third World INGO, the Human Rights and Peace Centre (HURIPEC) of Makerere University in Uganda. The most important factor about the HURIPEC is that it is located in a center of higher learning, and therefore, its focus cannot be entirely on activism. Since the primary purpose of a university is education and enlightenment, it will be obvious that the foundational question of a self-respecting human rights and peace center will be on the very conception of human rights itself. Since in the university setting almost every aspect of learning and pedagogy has some intersection with some aspect of peace and human rights, it will be obvious that an academic center of learning must, for academic purposes, embrace a conception of human rights that is comprehensive and far-reaching. This basically means that, however inchoately expressed, human rights — in the first instance — represents a kind of theory for inquiry. The boundaries of human rights, from an intellectual point of view, are not finite, but are critical for scientific inquiry, philosophical reflection, and juridical application.

With this background, the establishment of HURIPEC came in the context of a society that had experienced nightmarish human rights deprivations during the period of Idi Amin and Milton Obote. The most practical initiative brought in at the beginnings of the project was how to create programs that

would capitalize on student and faculty initiatives and energy for which there could be practical benefits. Since the project was started in Makerere University's law school, the representation of the poor and the position of women presented natural opportunities for outreach. From these experiences, HURIPEC developed proposals for expanding the curriculum of the entire university so that every student entering the university would have to take a course in human rights and peace as a condition of graduation. The course would be taught by a team of faculty from many different disciplines, and at its heart, would be a multi-method, interdisciplinary approach to human rights.

HURIPEC also developed a series of workshops that would promote a renaissance in interdisciplinary perspectives, from a human rights point of view. Each discipline was asked to reflect on what it did in teaching, public service and outreach, and research that had an impact on issues of human rights and peace, conceived of in the most comprehensive sense. Ultimately, the organizers of HURIPEC saw human rights and peace as matters of foundational intellectual responsibility. Therefore, those organizers envisioned that ultimately the university itself could not be seen as being either neutral or above matters of peace and basic dignity. In short, the purpose of the university, through the advancement of its teaching, research, and public service missions, is to take intellectual and social responsibility for peace and human rights.

HURIPEC has become an important intellectual arena for continental, regional, and national networking to bond the various segments in the various communities that are concerned with peace and human rights issues. HURIPEC's bold efforts — in not simply making human rights and peace a part of the university's agenda, but also in making it central to the identity and the mission of the university — may have far-reaching implications for higher education in Africa. In a region such as the Great Lakes, where political instability and insecurity are omnipresent facts of life, taking leadership in such an enterprise is not without its risks. Nonetheless, it is precisely this kind of courage and this kind of initiative emanating from the civil society that poses the important challenge for the business of taking human rights and peace seriously as we approach the millennium.

INGOs do not resolve the problems of managing power responsibly in the international arena. However, their existence and importance provokes a critical dialogue about the relationship of civil society to state action and the relation of these interests to the culture of human rights, and global common interests in peace, security, ecological integrity and the basic decencies in human associational behavior we equate with inherent dignity and respect.

Richard Dicker
Associate Counsel, Human Rights Watch

I want to begin my remarks on this celebratory occasion by noting the exciting growth of both human rights standards and the human rights movement. I think both Tom and Winston gave a sense of the growth of the human rights movement over the last fifty years. But certainly, the number of international human rights instruments has increased. The coverage, the number, and the types of people and violations included under those standards have increased.

I think it is important for us to take note of the real dynamism and evolution in the conceptual and theoretical nature of this movement. I think it is crucial because to remain relevant and effective, we need to remain very dynamic, and I do not think anyone would argue that now is not a time for complacency. We need to be dynamic and principled because the world is changing and more is demanded in order to extend protections to individuals and victims.

I want to root my remarks really in the history of a need for dynamism and development. Admittedly, while I will be a little bit provocative this morning, there can be no question that in the area of non-state actors, and particularly corporations, the movement needs to develop its tools and the standards that have enabled us to work effectively with government actors over the last fifty years. Very quickly, I want to sketch out the objective landscape as we see it.

The greater mobility of capital and its penetration abroad has had profound human rights consequences. The importance of corporate social responsibility for human rights has been underscored by the opening of markets worldwide and the international, national, and local measures to attract capital investment. Increasingly, corporations operate in states with widespread and serious human rights violations.

Since the end of the Cold War nearly ten years ago, investment has moved into countries from which it had been previously barred — Vietnam, Cambodia, Eastern Europe, and the

former Soviet Union. Investment has also flowed into countries in which it had been present previously, but the investment now takes a much more dynamic form — I am thinking of El Salvador, Guatemala, India, to name only a few. This is true in manufacturing, especially export assembly production, but also in oil and mining.

In addition, accompanying these objective trends there has been a decreased role of government and intergovernmental assistance and loans. For these reasons, corporations often have considerable power to influence human rights practices in the countries in which they operate. At the same time, poor human rights conditions reflect a lack of respect for the rule of law that may threaten international investments in the country.

In either case, corporations investing in large-scale operations owe it to their investors and taxpayers, not to mention potential victims of human rights violations, to address human rights conditions in countries they have targeted for investment.

Now, over the last several years, much attention has focused on low-wage, labor-intensive industries — like textiles, apparel, footwear, and electronics — where companies frequently jump to new locations for lower and lower wages, and locations where governments are more tolerant of labor rights abuse.

I will focus this morning on another sector where, for strategic reasons, Human Rights Watch has targeted its work, the extractive industries, and particularly oil.

In the extractive sector, the search for finite natural resources compels companies to pursue resources wherever the commodity can be found. Propelled by rising demand and new technologies over the last several years, multinational oil companies have explored and drilled across large swathes of increasingly remote areas. Multinational oil companies are working vigorously to drill and transport oil out of Central Asia, Africa, and the Americas to far-flung markets abroad.

We have monitored oil and gas extraction projects in Burma, Colombia, and Nigeria, carried out by IGEP, British Petroleum, Elf Aquitaine, Occidental Petroleum, Royal Dutch Shell, Total, and Unocal.

We know from a conceptual point of view that basic international human rights standards were not drafted to apply to corporations, and we have worked to fill a real conceptual gap. My organization has tried to do that by developing a conceptual approach of working guidelines that are based on an accomplice liability theory; that is, complicity by corporations in governmental human rights violations. I want to just extract a little bit from the policy that we have developed to give you a sense of how that works.

Recognizing that corporations have become a potent force in the shaping of human rights worldwide, Human Rights Watch believes that businesses have a duty to avoid complicity in, or advantage from, human rights violations. We focus our research and advocacy efforts on circumstances where that duty has not been fulfilled and where companies have complicity in governmental human rights violations. There are a few paradigmatic situations where we see complicity.

We are most concerned about situations of direct corporate complicity. In these instances, businesses facilitate or collaborate in government human rights violations. So while government forces commit the violations, corporations have acted as accomplices and beneficiaries.

One manifestation of this kind of complicity is a situation where the company acts as an agent of a human rights-violative policy of a government. An example that comes to mind is the Chrysler Beijing Jeep firing of a worker who was detained by the Beijing Public Security Bureau in 1994 for his involvement in unauthorized religious and pro-democracy activities. Essentially, Chrysler's decision to fire this individual was an implementation of the Beijing Public Security Bureau's persecution and harassment of him.

Another such example that certainly was in the news a few years back is Royal Dutch Shell's involvement in security force attacks on Ogoni protesters in southeastern Nigeria. In that situation, the company failed to criticize human rights violations that were committed in a wide-scale manner when the authorities were acting in response to corporate requests for security protection. That is direct corporate complicity.

There is another form that we have seen and we are concerned about. That is when corporations derive advantages

from the failure of government respect for, and enforcement of, their international human rights obligations. In this situation, governments are involved in systematic violations of rights and they fail to uphold their obligation to implement laws to comply with obligations. It is, in a sense, a situation of state omission and corporate commission, if you will.

The example I have in mind is General Motors' systematic practice of sex discrimination in conducting forced pregnancy testing on the Maquilladores in northern Mexico. Despite workers' complaints to state agencies responsible for enforcing Mexico's laws that were consistent with the ICCPR,¹ as well as the Convention on the Elimination Of All Forms of Discrimination Against Women,² Mexico failed to protect those rights and General Motors was a beneficiary of that failure.

The third instance of corporate complicity are those extraordinary situations where we would recommend no new private investment, a suspension of business operations, a boycott, or even a withdrawal of all foreign private investment. Such a situation where we would criticize corporate presence per se is exemplified by the conditions in Burma today under the SLORC military junta.

Such a situation is characterized by several of the following factors: grave and systematic rights abuse, abuses of such a nature that no business enterprise can avoid taint by operating in the country; no form of pressure from the international community has had, or has, any reasonable prospect of having a significant effect on those abuses.

That, in a nutshell, is the working model of complicity that we have tried to develop in a conceptual way to fill some of the gap that we see in the international standard. Now, this is only a working formulation, and I do not want to suggest that this guideline is the last word. We have a long way to go in deepening our analysis, and we are looking at other paradigms.

One very interesting and provocative analysis is developing in U.S. litigation. This is emerging in the case brought by Burmese citizens against the Burmese Government and Unocal

¹ International Covenant on Civil and Political Rights. U.N.T.S. No. 14668; Vol 999 (1976) G.S. Res. 2200A (XXI), 21 IN. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

² U.N.T.S. No. 20378 Vol. 1249, Dec. 18, 1981.

Corporation,³ which had entered into a joint venture for the construction of a natural gas pipeline from the Yadana natural gas field through Burma to Thailand. The case is being litigated in U.S. District Court in California.

I want to focus on one aspect of Judge Paez's order of April 1997 that was issued in response to Unocal's motion to dismiss. The judge held the court did have jurisdiction over claims against the oil company even if it did not have jurisdiction over the Burmese Government, and the applicable legal standard was the Alien Tort Claims Act.⁴

The plaintiffs have alleged that SLORC,⁵ the Burmese military junta, and the Burmese state oil companies were agents of Unocal, that the defendants were joint venture partners working in concert with one another, and that the defendants had conspired to commit violations of international law alleged in the complaint in order to further this gas pipeline. The plaintiffs allege that the private defendants were jointly engaged with state officials in the challenged activity — namely, forced labor and other human rights violations — in furtherance of the pipeline project. These allegations the court found were sufficient to support subject matter jurisdiction under the Alien Tort Claims Act.

What is particularly interesting — and this is what I really want to signal for you here — is the court's treatment of the state action requirement under the Alien Tort Claims Act. Judge Paez identified four distinct approaches that the Supreme Court had articulated on state action requirement: public function, state compulsion, nexus, and joint action. In this instance, the court applied the joint action approach and it found that the private actor (Unocal) could be a state actor if it was a willful participant in joint action with the state or its agents. Thus, the court found state action on the basis of a joint venture agreement.

Admittedly, this was a case of tort liability. But the issue of interest here is not the similarity or dissimilarity of tort litigation and international human rights standards, but whether

³ Doe v. Unocal 27 F. Supp. 2d 1174 (1998).

⁴ 28 U.S.C. § 1350 (1994).

⁵ State Law and Order Restoration Council (SLORC).

these tests for state action provide an appropriate mode of analysis for complicity in human rights violations.

In any case, I want to set that out on the table. I think it opens some very interesting questions that need to be thought through carefully. But what I see here is the possibility of taking a fresh look at those ways in which international human rights standards can be applied directly to private actors.

Now, having touched on corporate complicity, I want to talk very briefly about the emergence in the last few years of an exciting and interesting development, and that is the effort by corporations to develop voluntary codes of conduct. There have been numerous initiatives here in the United States and in Western Europe. Some of these are very promising.

The Apparel Industry Partnership, the Council on Economic Priorities, Social Accountability, 800 Program, these promote global codes of conduct on fair labor practices and include an attempt at credible independent monitoring. There is too little time to go into these in any detail, but I do want to flag two points for you.

First, the problem that we have seen is the translation of broad standards into specific policies. In other words, when you talk with Royal Dutch Shell or you talk with British Petroleum, the issue is not the formulation of the broad human rights norm and their acceptance of it as much as it is translating that into specific policies that will make a difference. The rubber hits the road outside the gates of the Royal Dutch Shell factory in Ogoni land, and that is where the broad principle needs to be refined and articulated as a principle.

Another issue, and a very, very difficult issue with these voluntary codes of course, is implementation, and specifically the transparency of implementation and the involvement of outside actors, particularly actors from the local NGO community, and not keeping any monitoring and reporting on corporate adherence to these voluntary codes an in-house affair. Those are big problems.

I think that the two programs I mentioned, the AIP and the Social Accountability Standards, have made efforts at that. But we have yet to see — really, it will take a while — what the real fruits of those activity are.

I want to just flag for you the kind of specific policies we think corporations need to adopt if their commitment to human rights is to be something more than a public relations gesture.

For example, we did a report on oil companies in Colombia, where the oil companies were making direct payments to military forces protecting their facilities and those military forces were linked to widespread human rights and humanitarian law violations. We recommended — and this would have been adopted voluntarily by British Petroleum if they chose to do so — that:

- The companies insert a clause into any security agreement signed with the government or any state entity that requires as a condition of contract that state security forces operating in the area of company installations conform to the human rights obligations the government has assumed, as well as under the International Covenant on Civil and Political Rights, as well as other international human rights and humanitarian norms.
- Where such formal arrangements exist, the companies' security agreements with state entities should be made public, with the sole exception of operative details that could jeopardize individual lives.
- The companies should insist on screening the military and police who are assigned for their protection in consultation with the defense ministry and civilian government agencies in charge of investigating human rights violations, such as national commissions on human rights.

So there are a number of very, very specific steps we think British Petroleum, Royal Dutch Shell, other large multinational oil companies, can implement to minimize the danger of their becoming complicit in government human rights violations.

Let me conclude by just saying that the fact that we lack standards that the international human rights movement needs, and that are necessary to ensure respect for universally recognized human rights, underscores an important challenge for us. The question it raises is, "If there is a gap, why not fill it?" — which raises the following question, "how to best fill the gap?"

I want to put a possible solution on the table. It is an idea that we have talked about at Human Rights Watch, and others

have undoubtedly discussed as well. Why not an international standard governing corporate conduct for involvement in human rights violations?

If you talk with officials from any of a number of U.S.-based corporations about the importance of their avoiding complicity in governmental rights abuses and their adopting a proactive approach, they quickly tell you, "How can you expect us as an American company to do this, because if we stick our head up above the parapet on human rights issues, we will be disadvantaged vis-a-vis our German or Canadian or French or Japanese competitors? You think those companies give a damn about human rights? We will lose out."

I think there is a grain of real truth to that, underscoring the fact that these practices will not best be regulated either through voluntary codes or national legislation on the domestic level. We are dealing, obviously, with a globalized situation, and the way to respond to that is through an international standard.

Now, there was an unsuccessful experience two decades ago attempting to draft a code for transnational corporations. That ran aground on the shoals of the new international economic order. But the world has changed a great deal since then. We are no longer in a world that is polarized by ideological and sharp political divisions, and certainly the market economy's hegemony is under no serious challenge.

We have seen in the apparel and footwear industries, the food industries, more recently among some oil companies, an effort at self-regulation. Why not create a standard that state governments, both those hosting multinationals and those where multinationals are operating, could adopt that would govern the human rights conduct of corporations?

Certainly, we could identify many, many reasons why this would be difficult, and undoubtedly it would be. But would it be wrong? Wouldn't it actually be right? I leave that thought with you in the spirit of this important anniversary.

Patricia Armstrong

*Senior Coordinator, International Financial Institutions
Program Lawyers Committee for Human Rights**

I will try today to very briefly discuss the World Bank and human rights, and some of the factors related to efforts to increase the Bank's consideration of human rights related to its work. The World Bank is of course just one of several international financial institutions whose activities directly affect or implicate human rights concerns, *e.g.*, the International Monetary Fund and regional institutions like the Inter-American Development Bank, the Asian Development Bank, and the European Bank for Reconstruction and Development. But due to time constraints, a focus just on the World Bank makes sense — it is the largest and most influential of the multilateral development banks, often setting the pace for other institutions.

It is useful to note at the outset that while this Panel is to focus on “non-state actors,” the World Bank and similar institutions are a bit of a hybrid, as they are created and owned by states. Thus, in a technical sense, they are not really non-state actors. However, given the fact that the management and staff of the Bank have enormous authority on a wide range of issues and decision-making that do not require the involvement of the Bank's board and its governmental representatives, its inclusion in this discussion is appropriate.

What I would like to try to do in the short time available is to discuss four areas: first, to review some of the relevant history of human rights at the World Bank; second to mention some recent developments; third, to briefly note the types of human rights issues that often arise in Bank activities; and fourth, to suggest some approaches and strategies to advance the consideration of human rights.

* Ms. Armstrong generously submitted a written transcript of the paper she presented at the Celebration. It is that paper, *The World Bank and Human Rights: Policies and Prospects*, which is printed here. Notably, her remarks at the Celebration did not vary substantially — if at all — from this paper.

To understand the World Bank's current view of human rights, it is useful to know a bit of its earlier encounters with the issue. Until the late 1980s, issues were almost entirely brought to the Bank as a result of external pressure.

First the United Nations, of which the World Bank is a specialized agency: In 1965 and 1967 the UN General Assembly passed resolutions calling for its specialized agencies to deny economic assistance to South Africa and Rhodesia because of their apartheid and other policies in Africa. The World Bank's response was that its charter prohibited it from complying with these resolutions. Article 4, Section 10, of the Bank's Articles of Agreement — the provision invariably cited in discussions about human rights — states:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decision, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.¹

The UN's legal counsel disagreed with the Bank's interpretation, arguing, I think correctly, that this provision was intended to prohibit interference by the Bank in internal political affairs and discrimination against a government because of its political character (*e.g.*, socialist, capitalist, etc.).² However, that view did not prevail and the Bank continued to approve loans to South Africa and Rhodesia.

Human rights concerns have also been raised by individual members of the Bank. It must be remembered that no one government can control the Bank: each holds only one weighted vote related to its contribution — *e.g.*, the United States, while the largest shareholder, has less than 17% of the voting power.

In 1977, Section 701 of the International Financial Institutions Act³ was passed as a result of the Bank's controversial aid to human-rights-violating Chile. Section 701 requires United

¹ Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature, Dec. 27, 1945, 60 Stat. 1440 (1946), TIAS No. 1502, 2 UNTS 134, as amended Dec. 16, 1965, 16 UST 1942, TIAS No. 5929.

² See 21 UN GAOR 4:20, UN Doc. A/C.4 SR 1653 (prov. ed. 1966), reprinted in 6 *International Legal Materials* 171, 172 (1967).

³ 22 U.S.C. 262d.

States representatives at the World Bank and other MDBs to oppose loans to governments engaging in “gross violations of internationally recognized human rights” except if loans “directly benefit the needy.” While the effectiveness of this law can be debated, it did raise the visibility of human rights in the World Bank and other MDBs, as well as in the U.S. Treasury Department. Since then, other US laws addressing human rights issues have been passed, including ones calling for fair labor practices, respect for the rights of indigenous peoples and the promotion of good governance, participation and reduced military expenditures.

In the 1980s, World Bank staff members started to give human rights more attention, although typically not using human rights terminology. They instead relied on terms like “governance” and “participation,” a practice that largely continues today. For the most part, their consideration of human rights was not for the value of these rights as rights, but rather for what they contribute to economic performance, or, more precisely, development effectiveness. This broadening reflected their conclusion that economic performance was not just affected by a policy but also the policy environment in which it was implemented, and this could involve human rights.

In 1989, the Bank published a report in which the Bank explicitly referred to human rights.⁴ For example, the report referred to the importance of the rule of law which “implies rehabilitation of the judicial system, independence for the judiciary [and] scrupulous respect for the law and human rights at every level of government”⁵ The rubric used for these issues was governance.

The growing attention to human rights prompted the Bank’s General Counsel, Ibrahim Shihata, to issue a legal opinion in late 1990 in which he sought to “establish a legally sound framework for treating the issue of governance in the Bank’s work.”⁶ Denominating human rights as “political” within the

⁴ World Bank, *Sub-Saharan Africa - From Crisis to Sustainable Growth*, A Long-Term Perspective Study (1989).

⁵ *Id.* at 192.

⁶ Memorandum of the Vice President and General Counsel, “Issues of ‘Governance in Borrowing Members — The Extent of Their Relevance Under the Bank’s Articles of Agreement”, at 2 (Dec. 21, 1990).

context of the charter, Mr. Shihata reiterated the charter's restrictions, but then stated that a violation of political rights might reach such proportions as to become a Bank concern due to their economic effects but only if such effects were "significant," "direct" or "preponderant."⁷ This opinion opened an important door.

So what do governance and participation mean in human rights terms at the World Bank? Neither concept has yet been reduced to an operational requirement, so there is no formal definition. Governance is quite a flexible term, but its human rights dimensions have generally related to transparency, accountability and a predictable legal framework. This usually means the need for an independent judiciary, a free press, an active and involved civil society, and non-discrimination laws (regarding the latter, the Bank has said: "Inherent in the concept of the rule of law is the notion of fairness and social justice"⁸).

I must also note that one of the strong motivations for the Bank's consideration of governance issues from the beginning to the present has been its concern about corruption. Human rights and corruption are not synonymous but are linked in many ways. Perhaps more importantly, no fight against corruption will be successful without respect for human rights.

Participation, a related concept, was developed simultaneously and closely related to the Bank's thinking about governance. Very generally, participation means the involvement of those affected by Bank activities — stakeholders — in their planning and implementation. Again, development effectiveness is the ultimate objective. The benefits provided to the Bank by participation include:

1. knowledge of how the intended beneficiaries of Bank activities see their needs and priorities
2. increase grassroots watchdogs who can monitor and press for government accountability, and
3. through operational collaboration with NGOs, better implementation of Bank projects than if the Bank was working solely with governments.

⁷ *Id.* at 38, 55.

⁸ World Bank, *Governance: The World Bank's Experience*, at 23 (1994).

Participation, like governance, has important human rights dimensions, most notably the importance of freedom of association, assembly and expression.

But what about economic, social and cultural rights? In contrast to civil and political rights, the Bank has taken a less restrictive approach to economic and social rights. Indeed, it has stated that they are its *raison d'être*. The problem for a human rights activist is how the Bank addresses these rights in its work. In essence, the Bank has stated that its respect for or observance of these rights is inevitable, even automatic, as it is subsumed within the Bank's poverty alleviation efforts — for example, in strategies to promote job creation or provide basic social services.⁹ While there is no question that many Bank projects address important economic and social issues, the planning, design and implementation of these projects or its policies more generally are not undertaken with a rights-based approach.

While the Bank's parameters for its consideration of human rights which I've just described are still largely in place, there have been a number of developments which present — or seem to present — opportunities for greater attention to human rights by the Bank. I will try to quickly note changes in five areas.

"Good governance" has continued to get attention and very soon will likely be an important criteria for the allocation of aid. This will occur through a soon-to-be completed agreement generally known as the IDA-12 Replenishment Agreement. Replenishment agreements are negotiated every three years by donors to the arm of the Bank that lends to the poorest countries, the International Development Association (IDA). The agreement sets terms and conditions on the use of the donors' contributions and in recent years has been an important tool to advance Bank reform. For example, the IDA-10 agreement in 1992 called for the liberalization of the Bank's information policy and the creation of a new complaint mechanism, now the World Bank Inspection Panel, both of which were hard-fought NGO objectives. The recently negotiated IDA-12 agreement,

⁹ See, e.g., "The World Bank and the Promotion of Human Rights," UN Doc. A/CONF.157/PC/61/Add.19 (June 10, 1993) [the Bank's submission to the World Conference on Human Rights in Vienna in June 1993].

which still has a few steps to go before finalization, reportedly will require that the governance of a recipient government be taken into account in determining the allocation of the Bank's aid dollars. Details about this new requirement are not yet available, so it is not clear how "governance" will be defined or how it will be applied. It is therefore difficult to assess what this change will mean, but it appears to be significant. Given that the term governance is subject to a variety of interpretations, it will be essential for this new criteria to be monitored closely to ensure that it is applied fairly — no matter what the size and influence of a country — and consistent with relevant international standards, including human rights norms.

In the area of participation, the Bank continues to emphasize its importance. Among the developments — not all of which are positive — are:

1. The Bank has increased the number of staff focusing on NGO issues at headquarters, in both central and regional divisions, and created new staff positions in a majority of its resident missions in borrowing countries.
2. There has been a welcome acknowledgment by the Bank of the importance of an enabling environment for NGOs if they are to be able to contribute to Bank activities. However, the translation of this acknowledgment into practice has fallen short and raised serious human rights concerns. In 1997, the Bank issued a discussion draft of a document called the "Handbook on Good Practices for Laws Related to NGOs." In the Lawyers Committee's view, this document is inconsistent in several respects with international freedom of association principles and, as a result, presents risks to NGOs, particularly advocacy groups.¹⁰ While the Bank has agreed to revise the draft Handbook and the problems will hopefully be corrected, its approach in this instance reflects a serious lack of due regard to human rights principles directly relevant to its work.

¹⁰ See Lawyers Committee for Human Rights, "The World Bank, NGOs and Freedom of Association: A Critique of the World Bank's draft 'Handbook on Good Practices for Laws Related to Non-Governmental Organizations'" (November 1997).

3. Likewise, a recent Bank paper discussed by its Board¹¹ while reaffirming the importance of NGOs to its work, also notes as an “emerging issue” the need for the Bank to give “due regard to the prerogative of governments” in the selection of NGOs for involvement in Bank activities. This illustrates a desire on the part of some governments to limit the groups that Bank staff can contact to only those it approves, which often may not include human rights groups.

Another notable development was the Bank's publication in October of a short report entitled *Development and Human Rights: The World Bank's Role*. It commemorates the 50th anniversary of the Universal Declaration of Human Rights and it includes a foreword by Mary Robinson, the UN High Commissioner for Human Rights. What is important about the report is not so much what it says — its aim is not surprisingly to put the World Bank in the best possible light in relation to human rights and therefore does not mention a whole range of human rights problems, particularly ones related to the implementation of projects. What is important in my view is that the report was issued at all, something that would not have happened very long ago, and that, by this report, there is an explicit recognition by the Bank of the relevance of the Universal Declaration to its activities. It should also be noted that the report's discussion of the limits presented by its charter to the consideration of human rights is more nuanced than in the past, something that is especially welcome.

Other developments include the Bank's reporting and some policy development on several rights or rights-related issues, *e.g.*, gender, child labor, post-conflict reconstruction, and the creation in some cases of institutional structures and joint efforts which involve external players to focus on these issues. Recent examples of the latter include the Structural Adjustment Participatory Review Initiative (SAPRI) and the External Gender Consultative Group.

A fundamental point must also be made: leadership is important in increasing the World Bank's attention to human rights and James Wolfensohn, since he became the Bank's pres-

¹¹ The NGO Unit, Social Development, “The Bank's Relations with NGOs: Issues and Directors, Social Development Paper No. 28 (World Bank, August 11, 1998).

ident in 1995, has taken a number of important, if not yet fully realized, steps in this direction. That said, any effort to seek reform in the Bank cannot ignore or underestimate the size, complexity, culture and tradition of this 53-year-old institution.

Having described how the World Bank views human rights, I would now like to mention some of the types of human rights issues that are often raised.

On a policy level, one example has already been mentioned — the flawed draft Handbook on Good Practices for Laws Relating to NGOs. Other issues include operational policies governing indigenous peoples and involuntary resettlement, both of which directly implicate human rights.

But it is often the case that the policy is not the problem, but rather its implementation. Moreover, the human rights issues presented by Bank-supported projects are often more directly related to the overall human rights environment that exists in the country. While the Bank rarely is the instigator of violations, it is not a minor player as it has great influence in the selection and design of projects and has supervisory obligations during implementation. Some projects with human rights problems that have received recent attention include:

1. Structural adjustment programs which reduce resources available for social services like health care, education, housing and the like.
2. The Yacyreta Hydroelectric Project in Argentina and Paraguay is supported by both the World Bank and Inter-American Development Bank and implemented by a binational organization. Human rights problems have included serious health concerns related to the manner in which the dam has been built and filled; intimidation of critics; and loss of livelihood without compensation. The project was developed without consultation or information to those affected by the project.
3. The Lagos Drainage and Sanitation Project in Nigeria has been the subject of NGO reports that the residents of 15 Lagos slums were forcibly evicted by the government, in an operation that included the demolition of homes and other property without compensation, resettlement or rehabilitation. Residents were also threatened and intimidated by armed security agents.

4. In connection with the NTPC Power Generation Project in Singrali, India, government and/or power company authorities engaged in a pattern of human rights violations against persons displaced by the project who sought to peacefully protest. Violations included arbitrary detention, degrading treatment in custody, indiscriminate use of force, as well as limits on freedom of assembly and association.
5. A Chadian legislator who was critical on corruption grounds of the proposed Chad-Cameroon Petroleum Development and Pipeline Project was charged, convicted and jailed for insulting and defaming the Chadian president. Two journalists were similarly charged and have stopped reporting on the project. Local NGO representatives at a recent meeting were quoted as saying: "We are limited by survival concerns when we conflict with decision-makers" and "Government repression is our reality."

When the World Bank works in places where repression is the normal response to criticism, it must approach those projects with extreme care.

We know about these projects because NGO efforts have brought them wider attention. But repression of NGOs can also make them reluctant to take up monitoring at all. In some countries, independent NGOs are so severely restricted that few if any exist. In such situations, the Bank is left to consult with international NGOs, who may be very good but are less desirable than local groups, or it consults with GONGOs — government-organized NGOs which cannot be described as independent — or it doesn't consult with anyone outside government. None of these solutions are apt to provide the Bank with an honest local perspective or the views it needs to do an effective job.

I hope that two things are clear from the above. First, there are real opportunities to increase the Bank's attention to human rights. But second, there is little likelihood of such concrete or systematic attention by the Bank without the active involvement of NGOs.

In addition to the new opportunities noted earlier, the Asia crisis has meant that the Bank can no longer use economic growth as an excuse for ignoring the behavior of repressive and authoritarian governments. While new Bank policies provide sometimes explicit, or at least implicit, recognition of human

rights, it is essential that they be monitored if there is to be any assurance of implementation. An NGO role at the World Bank is critical for the advancement of human rights. The Bank has not reached the point where it treats human rights law — national or international — in the same way that it looks at commercial law, e.g., trade, intellectual property, and the like, even when both have equal stature.

There are several ways which I believe will advance human rights and the ability to undertake human rights advocacy at the Bank. I'll mention five here:

1. Create a pre-approval project assessment process to consider: 1) the effects of proposed projects on human rights in a country and 2) the effects of human rights observance in a country on the purpose and likely success of the proposed project, and take this information into account during the appraisal of the project.
2. Use Bank oversight and evaluation mechanisms, such as public expenditure reviews, to assess the condition of economic and social rights in a country, and make its findings public.
3. Further liberalize the Bank's information policy and increase the translation of documents into local languages.
4. Adopt requirements for the mandatory release to and consultation with non-governmental actors of the Country Assistance Strategy during its preparation. The CAS is an important document outlining the future needs and priorities to be addressed by the Bank.
5. Strengthen the Inspection Panel, for example, to provide those who file complaints with an opportunity to review and react to Bank management's response; to allow the Panel members to visit the site and interview complainants.

A final point. The World Bank is not the UN Commission on Human Rights, but it undertakes a wide variety of activities which directly affect human rights. Greater attention by the Bank to human rights is not without challenges and sensitivities, but there has been movement and there are new opportunities. The Bank's recent human rights report commemorates the 50th anniversary of the Universal Declaration of Human Rights, and the relevance of that event to its mandate. NGOs must redouble efforts to see that this recognition is not simply a public relations effort.

QUESTIONS AND COMMENTS

Q: Would the panelists address the issue of corruption, which has affected so many of the poor countries?

PROF. McDONNELL: Patricia, do you want to start off?

PROF. ARMSTRONG:

Corruption is, as I mentioned, getting lots of consideration at the Bank, realizing, again, that development effectiveness is a key. So there is a recognition that they are not getting the bang for their buck because of corruption.

Again, it is not the same as human rights. But, as a friend of mine says, "human rights is the caboose on the anti-corruption train." Therefore, it is a real opportunity on a whole range of human rights issues to raise our concerns and get the Bank's attention, because it is focusing for a variety of reasons. They are having many P.R. problems. Particularly, Indonesia is a good example most recently.

PROF. NAGAN:

There is no question that the whole notion of the clientless state, which some of the early scholarship focused on and was largely ignored, is very critical, I think, just from a state angle. But the states are not the only players in the corruption game. We have formal definitions of the state territory, people, things like that. What we have not done is functionally label them — and some of them are, obviously, thought control, drug control, and so forth. So we tend to use the abstraction "sovereignty" without regard for the real dynamism inside the state and how it is actually organized.

In fact, the notion of combatting corruption may be the most radical invention that we can bring to development and to human rights work. The simple notion of accounting for people who believe the state is a milk cow, or corporations that have cozy relations with a state, or the problems basically even of development.

For example, in South Africa, they have had radical dispossession of the blacks over 300 years, and now the question is, how do they get economic empowerment? Of course, for many people, there is a search for shortcuts to it, and so corruption has become virtually a kind of freedom-destroying kind of virus on the effort to create a culture, as opposed to the apartheid culture, of human rights and development.

So I think the corruption issue is one of the most important issues. Simple as it may sound, the notion of accountants who may not have their throats cut is quite a vital thing as well in making this go.

But we also have to put this into the context of NGOs and the many different kinds of NGOs. Alan Bussack right now is on trial for allegedly leading the good life with Danish money in South Africa. And so, the corruption factor is not just statal, but it can permeate all the other institutions that otherwise started out with good intentions.

So yes, it is a critical factor, and maybe even an under-appreciated factor.

MR. DICKER:

Could I just add very quickly, in responding to your question, that certainly we have seen such close links between corruption and human rights violations. Where corruption exists pervasively, it is often facilitated by a government's violations of its citizens' right to free expression or free association. And certainly in those instances — we are seeing this in parts of west Africa now, where corruption about the construction of an oil pipeline from Chad to Cameroon is taking place,¹ and those who have been speaking out about the corruption have been imprisoned for exercising their right to free expression.

So there is a very, very close nexus in many situations, and I think we've got some work to do to figure out, from a human rights reporting perspective, how to do a better job of including that into at least the context of our report.

¹ See Tansamu, *Chad-Cameroon: Oil Pipeline Project Brought To a Standstill*, INTER PRESS SERVICE, Sept. 1, 1998, 1998 WL 5989059, AFRICA NEWS SERVICE, Aug. 4, 1998, 1998 WL 14362793.

PROF. McDONNELL: Another question?

Q: Accountants have come out with standards for whistle blowing as part of their job when they find a client has not reported properly. I have not noticed too many attorneys, including those involved in tobacco or working for major financial corporations, following that same standard. In fact, although they are listed, they are very rarely enforced. How would you deal with that?

I have seen it in this country, for example, where corporate officers' lawyers effectively allow human rights violations, or violations of certainly many of this country's laws. How can they then apply that in other countries?

PROF. NAGAN:

There is one. I am involved with something now with AID.² Essentially, we have had to transfer vast amounts of money to Uganda. It is always a nightmare to make sure that every cent is accounted for and there is a paper trail that follows all of this. What AID wants to do is to insist that it be done through the U.S. to them. I tried to tell them, "Why don't you do it over there?" We held the grant up because of this particular problem, because it is very difficult. I have had to make many trips over there to do the paper trail. In fact, the vast amount of the human rights work I have done has been basically accounting. You get the grant and then you have to do all these fancy things.

Even with Amnesty International, when I became Chair, with perhaps the naivete of an outsider coming in there, but I really wanted to ask some very naive questions that did not necessarily show up on the way in which the accountants had formulated things. It did help to rationalize our own way of doing things, because we wanted to know where this went, what happened afterwards, and why are we putting more money into it if we got nothing out of it.

Uganda again is an interesting case because there is a fetish for paper now. You know, one of the reactions has been that everything has got to be on paper with an accounting and

² Agency For International Development.

so on, which has actually in some ways made our task a little easier.

But there is no question that the resource issue which I raised is one of the problems of NGOs, but also of governments, and the paper trail for money and the transparency is the cure for a great deal of what actually happens. Greed and venality and so on are not outside of the framework of human feeling and motivation and so forth.

QUESTIONER:

I think one of the difficulties is that, although we have laws about bribery, in joint ventures with foreign corporations those laws are very, very hard to enforce. It is very hard to enforce rules of corruption where the partner, the foreign corporation, is doing the bribery.

PROF. NAGAN:

You are talking about the Foreign Corrupt Practices Act³?

QUESTIONER: Yes.

PROF. NAGAN: That makes most American businessmen crooks.

QUESTIONER: Exactly.

PROF. McDONNELL: Richard, did you want to respond?

MR. DICKER:

Just on that aspect of it, again what we have heard from many of our interlocutors in the corporate sector has been the Foreign Corrupt Practices Act creates a real disadvantage for American corporations — “Of course we support it, we honor it, but in Germany there is no such statutory prohibition and our German counterparts hand envelopes full of money over to corporate officials, government officials, and how can we compete with that?”

Again, I think what that does underscore is the need for moving this debate out of just the national arena and trying to put it on the level of international standard setting.

³ 15 U.S.C. § 78 (1988).

Q: As the ethical investment bandwagon has been picking up a lot of steam, at least in Britain and Europe, and I imagine in the States as well, that has had a lot of effect on corporate practice. At the same time, consumer action in fields like carpet manufacture — the symbol which shows that they are not made by children — and so on. And then, we saw the instance of the oil rig that Shell wanted to ditch in the Atlantic and consumer action in Germany had a big effect on that.

It seems to me that the field is pretty wide open, if only we NGOs can get together and work out a satisfactory code of conduct and then insist on its being followed, a frame in which, either by consumer action or by shareholder action, penalties will be imposed. I wonder what you think the prospects are for NGOs getting together worldwide to work out such a code.

MR. DICKER:

Let me make two points. First, with the broad trend that you have cited, in terms of things being pretty well wide open, actually I really agree with that. I think back just a couple of years ago, to 1994, when President Clinton made the decision to de-link most-favored nation trade status for China and Chinese human rights practices,⁴ and how at least the American corporate community was on a roll — I mean, it really was a juggernaut the way corporate America organized itself to bring about the end of that kind of connection between human rights and investment policy of the United States Government.

In a sense, I think the terrain has changed a good deal since then. I mean, that was a moment in my perception that the corporate community was really, really flexing its muscle extremely powerfully.

I think the kinds of developments you alluded to, in terms of consumer actions that have occurred over the last few years as a result of a range of NGO actors, from the National Labor Committee, to the Interfaith Center for Corporate Responsibility — I mean, there are many, many NGO actors in this field. And I think the terrain has changed, whereby the corporate sec-

⁴ Presidential Press Conference on China Most Favored Nation Status, May 26, 1994, (visited March 12, 1999) <<http://www.pub.Whitehouse.gov/retrieve-documents.html>>.

tor is more unnoticed and a bit more on the defensive. I think that is a very positive development.

I think that we are not simply talking about the apparel and footwear companies traditionally — Levi, Reebok, Liz Claiborne, those companies that have been out in front in a good way on a voluntary basis trying to change their practices — but we have seen it in the oil industry among a few companies. So I think conditions, in a way, are positive.

I also think that you are absolutely right, that what this would require is a worldwide international effort on the part of the NGO community reflecting its disparate segments — human rights, environmental, et cetera. I think we need to be dreamers and visionaries. I think that is possible. I think the conditions are there to make it happen.

PROF. NAGAN:

I think there are several levels of response, and I will try to be brief.

One is simply whether one approaches the relationship with corporations from an adverse point of view. I was very involved in the anti-apartheid aspect of it in the university divestment in the early 1970s and then later. That has certainly paid dividends.

But basically, it is very tough to take on these major players. So there are limits, but certainly you can do that. I suspect that most human rights NGOs tend to posture themselves in adverse relationships.

Now, the Secretary General has taken a different view most recently. Maybe it is the Ted Turner initiative. Not all corporations are necessarily going to be adverse. There is a difference between Turner and Murdoch.

So his position — and I think it is a correct one in my view, with all due respect to my colleagues — was to say, “Look, we’ve got to reach out to these guys and show them that it is in their interest that peace, that human rights, that development and other related, coordinated strategies are on their agenda as well and that they have some responsibility for it.”

Now, that is a different strategy. That is a more cooperative strategy. To some people, that is a selling-out. I understand the dynamic here.

But the problem of globalism that is positive for the vast majority of the have-nots of the planet, if you look at — I think somebody mentioned Africa yesterday; half the people of sub-Saharan Africa are living on a buck a day. So there is this absolute brutal, grinding, poverty dynamic here.

I think that, unfortunately, or rightly or wrongly, the existing reality is that if a Third World country does not come into the system more or less the way it is, you do not have to do anything to them; you can just leave them to completely wither on the vine. So that the old socialists from South Africa have become global capitalists, and even the residue of the Communist Party in South Africa says, "We are investing in these corporations. What are we going to do with our dough? We are going to have seven hours on Marxism."

So I think this is not simple, but I think the brute reality is that these are major centers of global power, and I do not think you can always confront them in this kind of adversarial mode, and you cannot assume that they themselves are not complex organizations, and you have to find out the extent to which you can shift them into a different paradigm and redefine their own self-interest.

QUESTIONER:

I do agree with that, particularly now that NGOs themselves are having to have very often sponsorship of some of these countries.

PROF. NAGAN: I am afraid Amnesty ran with Reebok.

Q: I have a question following up on what you just said. We have done this with tobacco and with other financial institutions. Corporations have seen that it is in their interest and to their bottom line in many different ways and will be more cooperative to make changes. That is one thing.

The other is there are corporations that are doing this. Why not get those corporations together and see what they have done and see how then they can influence other corporations to also become good partners and good players for working in this field? Let's work with them and take what is good and then see where we can grow and develop from there.

MR. DICKER:

I think that is very important, and I think — Trish, maybe you know more about this than I do — but I think the apparel industry partnership effort, which — I cannot recall — six or seven of the most human rights-conscious footwear and apparel companies are exactly trying to do that, reach out to other companies in that sector and bring them into the kind of agreement that they have made as part of the AIP.⁵ I think that is very important.

We have talked to certain oil companies about playing that same kind of role. The world oil industry sector is not uniform. You can see more advanced companies, and exactly the question is: what can they do to turn their competitors and bring them along? That is at an early stage.

I think, to be frank about it, their response is a kind of a polite, but very cynical, reaction, "The guys down the block at Exxon are not going to pay any attention to this whatsoever." I do not think we should just accept that. I think we've got to be tenacious on that, but I think that is a very important strategy.

Lastly, as an overarching thing, I certainly do not mean to suggest that it is a question simply of confrontation. I think it is a question of working with the best. I think we have to be clear ourselves. We have different objectives, different interests. We have to try to be able, between the best elements in the corporate community and the NGO community, to identify where our interests overlap and how we can work together, and be honest and candid with one another that we will not always agree and that is just the nature of the world.

PROF. McDONNELL: Patricia, did you want to respond?

MS. ARMSTRONG: No.

PROF. McDONNELL: Other questions?

Q: I just have a comment to make. I was talking to someone who mentioned an exciting development in terms of the Foreign Corrupt Practices Act. In December 1997, the OECD⁶

⁵ Apparel Industry Partnership Effort.

⁶ Organisation For Economic Cooperation and Development.

completed a treaty, a Bribery Convention,⁷ which does require OECD nations to adopt and enforce it. It not only requires OECD nations to make bribery an offense within their jurisdictions, which they probably already had, but it also requires them to make bribery overseas anywhere by their nationals an offense, which could be a precursor to these international standards that we have been talking about. It is in, I think, a very controversial area, to make a judgment about bribery overseas. I think just seeing how that works will be very interesting.

Q: Just a brief comment. I think that the argument put forward by some corporations, the argument based on if they do not do it others will, is a very insensitive, immoral, and many think it is an unlawful argument that should not be given any weight at all and we should waste no time refuting this argument. This is one comment.

My other point is that it is very hard for some NGOs to be objective and to stay with a humanitarian, even-handed approach to problems. I had a discussion yesterday with an Amnesty International activist who was asking me about the Lebanese detainees in south Lebanon in the so-called Israeli security zone, without showing any interest at all in the conditions and plight of thousands of Lebanese detainees in Syria.

MS. ARMSTRONG:

Could I just make one point? There is a similarity here to your first point, about when the corporation says "if we do not do it, someone else will." The World Bank says something quite similar: "Our involvement means our higher standards will be applied, and therefore it is better for us to be involved. You do not want us to leave. You should not press us to leave this otherwise-questionable project because of that reason."

PROF. McDONNELL:

Thank you, and I would like to thank the panelists for their discussion.

⁷ United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, G.A. Res. 191, U.N. GAOR, 51st Sess., U.N. Doc. A/601 (1997).



Compliments of Reuters/Gary Caskey/Archive Photos

An aging pot of flowers adorned with a cross hangs from the picket fence where gay University of Wyoming student Matthew Shepard was tied, beaten, and left just outside of Laramie. Shepard was beaten October 6, 1998 and moved to a Fort Collins hospital after he was found with severe head injuries. Shepard died on October 12, 1998.